State Personnel Board, State of Colorado

Case No. 99 B 085

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RAWN SWARBRICK,

Complainant,

v.

DEPARTMENT OF HUMAN SERVICES,
COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,

Respondent.

Hearing on this matter was held on April 21, 1999 and May 10, 1999 before Administrative Law Judge G. Charles Robertson at Colorado Mental Health Institute at Pueblo, 1600 24th Avenue, Pueblo, Colorado.

MATTER APPEALED

Complainant, Rawn Swarbrick ("Swarbrick") appeals the disciplinary termination imposed by Respondent, the Department of Human Services, Colorado Mental Health Institute at Pueblo ("CMHIP"). CMHIP based the disciplinary action on grievous misconduct, willful misconduct, Complainant's failure to his perform job, Complainant's inability to perform his job and moral turpitude.

For the reasons cited below, the actions of Respondent are upheld.

PRELIMINARY MATTERS

Respondent was represented by Beverly Fulton and Stacy Worthington, Assistants Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO 80203. Complainant was represented by Jill S. Matoon, Esq., 650 Thatcher Building, Pueblo, CO 81003.

1. Procedural History

The Notice of Appeal was filed on February 10, 1999. Complainant appealed the termination of his employment and claimed that the disciplinary action was contrary to personnel board rules, was improperly based on anonymous telephone calls, and was imposed based upon a disputed "hit and run" traffic infraction. Complainant requested reinstatement.

Complainant moved to amend his Notice of Appeal, to include a claim of discrimination on March 9, 1999. The motion was denied on the grounds that Complainant provided no good cause as to why the appeal should be amended. Complainant failed to provide any legal argument to support the amendment of his appeal. Respondent, on the other hand, provided precedent that supported its position.

The location of the hearing was moved to Pueblo, Colorado pursuant to an order dated April 1, 1999.

On April 1, 1999, the administrative law judge ordered the parties to submit 5 page briefs on the subject of moral turpitude in the context as a grounds for discipline. The parties subsequently submitted the briefs on April 15, 1999 and April 16, 1999.

2. Witnesses

Respondent called the following witnesses during its case-in-chief: (1) Complainant: (2) Irene Drewnicky, Assistant Superintendent, CMHIP, Pueblo, CO; (3) Jennifer Nava, 3820 Sheffield, Pueblo, CO; (4) Adeline Sanchez, 28 Posada, Pueblo, CO; and (5) Sara Stahle, 131 Cornell Circle, Pueblo, CO. In addition, Respondent called Jerry Adamek, former Director of Youth Corrections, 4255 South Knox Court, Denver, CO as an expert witness.

Respondent called the following witnesses in its rebuttal case: (1) Irene Drewnicky: (2) Ann Marsico, CMHIP; and (3) Hillary Phelps, CMHIP.

Complainant called the following witnesses during its case-in chief: Complainant.

3. Exhibits

The following exhibits were admitted into evidence during Respondent's case-in-chief:

Exhibit 1	Termination letter from Irene Drewnicky, Assistant Superintendent for Clinical Services, to Rawn Swarbrick 1/28/99	No Objection by opposing party.
Exhibit 2	Transcript of R-6-10 meeting 1/15/99	Admitted on limited basis: (1) demonstrating part of appointing authority's decision making; and (2) for non-hearsay admissions of party opponent. Admitted over objection of opposing party.
Exhibit 4	State of Colorado Traffic Accident Report	Admitted on limited basis: (1) demonstrating part of appointing authority's investigation.
Exhibit A	Anecdotal Note to Rawn Swarbrick from Gregory M. Trautt	No objection by opposing party.

The following exhibits were admitted into evidence in Complainant's case in chief:

Exhibit A	Anecdotal Note to Rawn Swarbrick from Gregory M. Trautt	Admitted during Respondent's case-in-chief.
Exhibit B	Performance Plans/Evaluations dated: 5/2/94; 12/29/94; 6/1/95;7/19/96; 2/17/97; 3/6/98; 6/30/98	Parties stipulated into evidence.
Exhibit C	Suspension Letter to Complainant dated 12/28/98	No objection by opposing party.
Exhibit D	Notice of R-6-10 meeting dated 1/13/99	No objection by opposing party.
Exhibit E	Compilation of References re: Complainant	Individual references were reviewed by ALJ and admitted on a case-by-case basis.
Exhibit F	Drawing of Intersection	No objection: noted may not be to scale.

4. Complainant's Motion for Directed Verdict

A. Standard

At the close of Respondent's case-in-chief, Complainant moved for a directed verdict. The administrative law judge determined that a motion for directed verdict, when the court is the trier of fact, is equivalent to a motion to dismiss (involuntary) pursuant to C.R.C.P. 41(b). See: *Campbell v. Commercial Credit Plan, Inc.*, 670 P.2d 813 (Colo. App. 1983). This rule allows for involuntary dismissal of a case. C.R.C.P. 50 provides in part: "A party may move for a directed verdict at the close of the evidence

offered by an opponent or at the close of all the evidence." A motion for directed verdict should be granted only when the evidence has such quality and weight as to point strongly and overwhelmingly to the fact that reasonable persons could not arrive at a contrary verdict. See: *Jorgensen v. Heinz*, 847 P.2d 1981 (Colo. App. 1992), cert. denied. In passing upon motion for directed verdict, a trial court must view evidence in the light most favorable to party against whom motion is directed, and every reasonable inference drawn from evidence presented is to be considered in the light most favorable to that party. See: *Pulliam v. Dreiling*, 839 P.2d 521 (Colo. App. 1992).

So as to conform with both administrative law and C.R.C.P., and given that Respondent has the burden of proof in this matter, it will be interpreted that Complainant's Motion for a Directed Verdict equates to a motion for an involuntary dismissal against Respondent and that the standard of review requires that the administrative law judge view the evidence in the light most favorable to Respondent.

B. Complainant's Argument

Complainant makes a number of arguments in his motion. Complainant argues that an issue exists as to his termination under R-6-9, with regard to *conviction* of an offense of moral turpitude that adversely affected his ability to perform his job. Complainant argues that Complainant's termination was initially based on his being charged with a "hit and run" auto accident, but at the time of hearing, Respondent relied upon the behavior associated with the auto accident and not the specific charges against Complainant. Complainant argues that acquittal of the charges mandates that Complainant not be terminated based on the charges, as described to him at the time of termination. In support of this argument, Complainant asks the Board consider *Cathcart v. Dept. of Corrections, Colorado Territorial Correctional Facility*, State Personnel Board case no. 95 B 052 (1995). In that case, the administrative law judge reversed the Dept. of Corrections, holding in part, that if an employee is to be terminated based on behavior, not charges, the behavior must be proven. Complainant also states that *Cathcart* requires Respondent to show actual adverse impact on the department. Complainant maintains that while Respondent demonstrated through evidence/testimony that Complainant's behavior *could* have an adverse impact, Respondent failed to show an actual adverse impact. Thus, Complainant argues that he should not be terminated based on (1) his behavior, as opposed to specific charges; or (2) the potential for an adverse impact on the agency. Complainant further maintains that C.R.S. 24-5-101 provides that a conviction of a crime of moral turpitude, in and of itself, is not sufficient to prevent state employment. It is Complainant's position that this supports his argument that he cannot be terminated because there is no actual adverse impact on Respondent.

Based on the testimony of Respondent's witnesses, Complainant argues that the "hit and run" accident was not the fault of Complainant. He maintains that he hit a car

that turned left in front of him. Complainant maintains that this is not the type of "bad" act which should mandate termination. While an issue exists as to whether Complainant should have remained at the accident scene, Complainant maintains that he was not culpable for the auto accident itself and that he should not be terminated for such.

With regard to incidents on a camping trip, Complainant maintains that he had already received discipline regarding the issue, pursuant to Board Rule R-6-5, 4 CCR 801 by having received an anecdotal note in his file equivalent to a corrective action, effective for 6 months. As a result, the same incidents cannot be relied upon for termination. In other words, Complainant relied upon the anecdotal note, complied with its terms, and should not have to be faced with additional discipline for the same acts.

With regard to Complainant's failure to supervise youth in the evening during the camping trip, Complainant maintains that he was not terminated for such matters. Complainant maintains that with regard to the camping trip, he was disciplined only for sharing a tent on two evenings with a female staff member. The evidence provided by Respondent regarding the failure to supervise youth at night is not relevant.

Complainant maintains that sexual harassment did not occur at the time of the camping trip. The argument that Complainant created a hostile work environment is not persuasive according to Complainant. Complainant relies upon *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996) and the definition of sexual harassment and a hostile work environment.

Finally, Complainant argues that Respondent cannot argue that Complainant's conduct was so serious as to warrant discipline since Respondent delayed implementing discipline well after the camping trip. Complainant relies on *Pacheco v. Dept. of Higher Education*, State Personnel Board, case no. 94 B 006 and Board Rule R-6-2, 4 CCR 801. Given Respondent's position that an anecdotal note is not corrective action and the fact that no corrective or disciplinary action was timely imposed by Respondent, Complainant believes Respondent failed to show that Complainant's behavior was so serious as to warrant termination. Such is reinforced by a fully competent performance evaluation after the "hit and run" and the camping incidents.

C. Respondent's Argument

Respondent opposes Complainant's Motion for Directed Verdict. Respondent maintains the administrative law judge must view the evidence admitted in "a light most favorable to" the non-moving party, i.e., Respondent. Given this standard, Respondent maintains that the motion must be denied. First of all, Respondent maintains that Complainant mis-characterized the evidence regarding the imposition of discipline

because Respondent did not have notice of both incidents giving rise to discipline. Second, Respondent argues that it did impose discipline on other employees who participated in events of the camping trip. Third, Respondent argues that *Cathcart* is distinguishable from this matter. Fourth, Respondent maintains that Complainant's actions involved moral turpitude in a definition different than that contemplated by the Board rules. As a result, Complainant should be held accountable to CMHIP's definition of moral turpitude. Next, Respondent maintains that Complainant failed to perform his job by failing to appropriately model behavior. Thus, he should be subject to disciplinary termination. Respondent states conviction of a DUI in this case was not the grounds for discipline, as demonstrated in the termination letter, Exhibit 1. Respondent further maintains

that students raised issues involving the camping trip, thus showing an adverse impact on the agency and that the issues were serious and flagrant. Finally, Respondent cites to Complainant's own admissions with regard to his behavior as grounds for his termination.

D. Ruling on Motion by ALJ

At the time of hearing, after having heard testimony by the witnesses listed above in Respondent's case-in-chief, and after having reviewed the evidence, the parties' prehearing statements, and the issues in this matter, the administrative law judge denied the motion for directed verdict. That ruling is adopted herein.

5. Judicial/Administrative Notice

Judicial and administrative notice is taken of previous initial decisions of the Board and applicable statute and case law. In addition, the Board takes notice of C.R.S. 42-4-1602.

ISSUES

1. Whether the Complainant engaged in the actions for which discipline was imposed;

2. Whether the disciplinary termination was within the range of reasonable alternatives available to the appointing authority;

3. Whether the actions of the appointing authority were arbitrary, capricious or contrary to rule and/or law; and

4. Whether attorney fees should be awarded to Complainant pursuant to section 24-50-125.5, C.R.S. (1998).

FINDINGS OF FACT

(parentheticals refer to exhibits or witness' testimony)

I. Respondent's Background

1. CMHIP is a state institution responsible for providing mental health care to individuals residing in the State of Colorado. CMHIP has a number of different divisions, including divisions which administer mental health services to youth. The divisions include the Institute of Forensic Psychiatry, Adult Psychiatric Services, and the Child and Adolescent Treatment Center. (Drewnicky).

2. CMHIP, as a facility of the Department of Human Services, is subject to an accreditation procedure. The accreditation procedure relies upon a number of standards established by the Department of Human Services, state statute, federal statute, and national accreditation agencies. (Drewnicky, Adamek).

3. CMHIP's budget and funding sources are linked to its accreditation. In other words, in order to maintain funding for programs, CMHIP must comply with the variety of accreditation standards. (Drewnicky).

4. Additionally, CMHIP maintains contracts with the Division of Youth Corrections for the housing, care, education, and treatment of youth who have been involved in the criminal justice system. Youth can include individuals ranging in age from 11 to 17 years of age. These youth are known to act out their problems in inappropriate actions, which may violate criminal law. They can include victims of physical and sexual abuse, perpetrators of physical and/or sexual abuse, and youth involved in illegal drug use. Often, these youth do not recognize the boundaries of relationships as defined by the community in general. (Adamek, Drewnicky).

5. In addition to providing for the care of such youth, CMHIP is responsible for preserving public safety vis-à-vis its patients. (Drewnicky, Adamek).

6. The treatment of youth addresses issues of drug and alcohol abuse, physical abuse, sexual abuse, and other various behavioral problems.

7. CMHIP maintains what has been characterized as the Sierra Vista Regional Treatment Center, Prairie View School ("Sierra Vista") for youth. This school is responsible for providing education to youth while at CMHIP. The school's structure includes having a principal and a teaching faculty. (Drewnicky, Swarbrick).

8. Youth attending Sierra Vista are most often youth who have been in a variety of other rehabilatory settings and have usually had extensive involvement in the criminal justice system. (Drewnicky, Swarbrick, Adamek).

9. As part of the treatment program provided by Sierra Vista, staff are expected to model "appropriate" behavior. Modeling is a critical element to the rehabilitation of these youth. This means of treatment allows Sierra Vista youth to observe appropriate adult behavior, learn trust in interactions with adults, and understand relationships amongst genders. Modeling involves the expectation that the adults caring for such youth will model behaviors that reinforce the treatment of youth's behavioral problems. (Drewnicky, Swarbrick, Adamek).

10. In addition, part of the treatment program requires youth attending Sierra Vista to model appropriate behavior. Again, this allows for reinforcement of treatment methodologies. If a youth fails to model appropriate behavior, the individual is subject to a loss of privileges. (Drewnicky, Adamek).

11. During December 1998 and January 1999, the Denver Post published a series of articles in which concerns about CMHIP's employees and their past criminal behaviors were identified. (Drewnicky, Swarbrick).

II. Complainant's Background

12. At the time of the imposition of discipline, Complainant was principal of Sierra Vista. Complainant was principal of Sierra Vista from June 1998 until his termination in January 1999. (Swarbrick).

13. Prior to being principal of Sierra Vista, Complainant was a teacher for approximately one and one-half years at the school. (Swarbrick). Before working for CMHIP, Complainant was employed with the Youth Offender System ("YOS"). He transferred to CMHIP after his wife was in an accident precipitated by a drunk driver. (Swarbrick).

14. Complainant graduated college with a bachelor of arts in mental retardation studies. In the course of his career, Complainant obtained a masters degree in emotional disturbance education and obtained certification as a school principal. In addition, Complainant obtained post-graduate education in the field of organization theory and administrative behavior. In 1994, Complainant continued his education and graduate work by attending courses in school and community relations. (Swarbrick, Exhibit E).

15. Prior to working at Sierra Vista, Complainant had a background in providing psychological treatment of individuals, including youth. Complainant's employment history includes the following:

Year	***Experience***
1977 through 1984	Maximum/minimum Security Relief Child Care Worker
1978 through 1988	Teacher Supervisor/Clinical Team Member/Educational Therapist
1984 through 1988	Program Director for El Pueblo Boys Ranch
1990 through 1991	E.D. consultant
1991 through 1993	District Emotional Disturbance Program at Air Academy District #20
1993 through 1997	Principal, Dept. of Corrections/Youth Offender System

(Exhibit E).

16. In addition to the above employment history, Complainant participated in numerous seminars and training. The topics included: anti-gang training, normative systems training, guided group interaction training, inclusion for severely disabled students program, emotionally/behaviorally disturbed case study seminars, being a school principal, non-violent therapeutic intervention, and getting the most out of group work seminars. (Exhibit E).

17. Complainant participated in the community in a number of ways, including: working with the Rocky Mountain Boy Scouts; attending the Parent Training on Drug Counseling at Wesley United Methodist Church program; attending Univ. of Colorado, Colorado Springs continuing education; participating in the Big Brother Program; and working with the Community Recreation Volunteer with Physically Disabled Population program. (Exhibit E, Swarbrick).

18. In the course of his career, Complainant obtained a number of accolades. He received praise from the Dept. of Corrections in areas of zero-based budgeting, teaching, and continuing education. (Exhibit E). Complainant received numerous recommendations allowing him to continue his post-graduate education. (Swarbrick).

19. During the course of Complainant's employment with the State of Colorado, he received the following ratings:

Date	***Rating***	***Applicable Comments***
12/29/94 Youthful Offender System as a Teacher 1D	Good	Complainant disagreed with evaluation. Strengths: education and experience are an asset. Areas of Development included Complainant's need to recognize chain of command.
5/2/94 Progress Review Form	**(No Identifiable Rating)**	**Outlined a number of performance factors. It notes Complainant's abilities to use non-traditional techniques; it notes that**

		Complainant must be an appropriate role model for residents of the program (YOS) and must portray a professional image at all times.
6/1/95	Good	Complainant disagreed with evaluation. Strengths: good interpersonal relationship skills with co-workers; knowledge of educational requirements is commendable. Areas of Development: Completing requirements in time management and fulfillment of curriculum; and need to hold youth accountable for actions.
7/19/96	Good	Strengths: communication "outerpersonal" relations, desire to improve educational program. Areas of development: administrative abilities, timeliness, organizational commitment.
2/17/97	Commendable	Narrative: Complainant is an excellent educator.
3/6/98 at Regional Treatment Center	Commendable	Strengths: strong rapport with students and staff. Areas of development: Timeliness of reports.
6/30/98 Teacher III	300 (below 300 requires Corrective Action)	Interim evaluation through 10/98.

(Exhibit B, Swarbrick).

20. In the process of teaching, Complainant admittedly utilized examples from his own life to demonstrate particular points. For example, to educate youth with regard to drunk driving, he would often use the incident involving his wife as an example of the impact of such reckless behavior.

21. In 1994, Complainant was convicted of Driving with Ability Impaired ("DWAI"). (Swarbrick).

III. Incidents of Summer and Fall of 1998

A. The Camping Trip

22. During the spring of 1998, Sierra Vista's principal was retiring. As a result, a selection process commenced. Complainant participated in the process and was one of the final candidates for the position. (Swarbrick).

23. On May 26 through 28, 1998, while still a teacher at Sierra Vista, but after having learned that he was a final candidate for the principal position, Complainant participated in a camping trip with approximately 15 youth from Sierra Vista. The trip was planned by another staff member, Ann Marsico. (Swarbrick, Marsico).

24. Complainant was the senior staff member on the trip and was accompanied by three other staff members of Sierra Vista including Hillary Phelps, Ann Marsico, and Dean Finto. (Swarbrick).

25. During the first evening of the trip, Complainant and Marsico shared a tent. As a result, Finto and Phelps had to share a tent. (Swarbrick, Phelps, Marsico).

26. Complainant and Marsico were involved in a romantic relationship subsequent to the camping trip. (Swarbrick, Marsico).

27. The Sierra Vista youth set up tents, and slept under tarps, within 15 yards of the Complainant's tent. (Swarbrick, Marsico, Phelps).

28. On the second evening of the trip, Complainant and Marsico again shared a tent. During the evening, one of the Sierra Vista male youth became scared. After approaching Complainant while he was in the tent, the male youth was instructed by Complainant to sleep outside and next to the tent. Complainant did not fully inquire as to what was causing the male youth's fear. A number of other youth ended up sleeping outside Complainant's tent, surrounding the frightened youth. (Swarbrick, Marsico).

29. As a result of the sleeping "arrangements," Phelps was compelled to inform her family that she had to share a tent with a male staff member. Yet, Phelps did not claim that Complainant's actions caused any sexual harassment or a hostile work environment. (Phelps).

30. During the trip, no arrangements were made for the supervision of the youth during the nocturnal hours. In other words, the staff failed to provide for any "bed checks" during the two evenings. Failure to provide supervision of the youth during the evenings was in violation of the residential treatment centers contract's with DYC and was contrary to established procedure at CMHIP. Such failure also demonstrated a lack of leadership by staff. (Adamek, Swarbrick, Exhibit 2).

31. After the trip, Complainant believed that the sleeping arrangements during the camping trip represented poor judgment, were inappropriate and unprofessional. Complainant believed upon reflection after the incident that the sharing of tents between male and female staff was inappropriate, created confusion re: gender relationships amongst the youth, and demonstrated poor role modeling. (Swarbrick, Exhibit 2).

32. Within a few weeks after the camping trip, Dr. Gregg Trautt, Complainant's

supervisor, learned of the events of the camping trip. Subsequently, Dr. Trautt met with Complainant to discuss the matter. (Swarbrick).

33. After Complainant admitted to the behavior, Dr. Trautt decided to place an anecdotal note in Complainant's supervisor's file (not the official personnel file). The note was issued on June 9, 1999 and advised Complainant that he would be expected to display better judgment. The note described Complainant occupying a tent with a female staff member during the camping trip. The note further provided that it would be retained by Complainant's supervisor for six months. If no further incidents "as described above" occurred, the letter would be removed from the file. (Exhibit A).

34. On January 15, 1999, a Final Report of Investigation was completed by CMHIP of the camping incident. Such a report was prompted, in part, by telephone calls initiated by Complainant's wife. (Exhibit 1).

B. Traffic Accidents

35. On or about June 3, 1998, Complainant was involved in 2 traffic incidents. (Swarbrick).

36. Complainant and Jennifer Nava collided at the intersection of Broadway and Abriendo, in Pueblo, CO between 9:30 and 10:00 p.m. (Exhibit F). At the time of collision, Nava proceeded down the street, pulled into an eating establishment and checked the car for damage. The passenger's side of her truck had sustained significant damage. (Nava, Swarbrick).

37. At the time of collision, Complainant made a cursory review of the scene from his vehicle, left the scene without stopping, and continued towards his destination, home. (Swarbrick).

38. Subsequently, while traveling home, Complainant hit a parked car owned by a neighbor. (Swarbrick). After the second collision, Complainant walked a few blocks home.

39. Responding to a report of the first collision, the Pueblo Police department identified Complainant's parked vehicle and proceeded to Complainant's home. At that time, the police suspected Complainant had been driving after having consumed alcohol.

40. Complainant cooperated with the police, admitted that he had been driving the vehicle, and that he had consumed alcohol. Complainant was celebrating his new job as principal of Sierra Vista. (Swarbrick). Complainant submitted to a

breathalyzer test. The test indicated at least an alcohol level of .17 BAC. (Swarbrick).

41. On March 25, 1999, Complainant entered a Plea of Guilty to driving under the influence. (Exhibit 5). As part of the plea agreement, other charges related to both collisions were dismissed.

42. The accidents of June 3, 1998 did not occur during work hours and did not involve state property. (Exhibit 5).

43. Complainant failed to immediately disclose the events of June 3, 1998 to his supervisors although he did disclose the events to Marsico and another members of CMHIP staff. (Swarbrick).

44. During the summer and fall of 1998, Respondent began to receive anonymous telephone calls informing CMHIP of both the camping and traffic accident events. As a result, Drewnicky placed Complainant on administrative suspension with pay effective December 29, 1998. Drewnicky stated that the reasons for suspension **were**: (1) willful misconduct based on sexual harassment; (2) maintaining a personal relationship with another employee that is viewed as offensive and harassing to others; and because of the revocation of his driver's license based upon an offense of "moral turpitude." Drewnicky stated that Complainant's relationship with Marsico was viewed by others as inappropriate, unprofessional, and bothersome. She also stated that Complainant failed to report the circumstances of the traffic accident(s) to his supervisor. (Exhibit C, Drewnicky).

45. A CMHIP investigation was completed with regard to the camping trip on January 15, 1999. That investigation concluded that there had been a violation of CMHIP's sexual harassment policy as a result of the cohabitation on the camping trip because it placed two subordinate employees, Finto and Phelps, in a intimidating, hostile, and/or offensive work environment. (Exhibit 1). The investigator specifically stated that Complainant's supervisor had found no negative impact from the camping trip on Complainant's performance.

46. Drewnicky provided notice to Complainant of an R-6-10 meeting. (Exhibit D, Drewnicky). Drewnicky listed issues as including events of the camping trip, the relationship (subsequent to the camping trip) between Marsico and Complainant, events leading to the revocation of Complainant's driving license, Complainant's arrest and offense record, and how all of the outlined issues impacted Complainant's ability to perform his job, youth, and the institution. (Exhibit D).

47. On January 15, 1999, an R-6-10 meeting was held. (Exhibit 2, Drewnicky,

Swarbrick). In preparing for the meeting, Drewnicky reviewed Complainant's personnel file, reviewed policies on conduct of employees at CMHIP, and reviewed traffic accident information as provided by CMHIP's police. (Drewnicky).

48. Drewnicky also met with Complainant's wife regarding a letter Complainant's wife had sent to CMHIP. (Drewnicky).

49. On January 28, 1999, Drewnicky imposed a disciplinary termination upon Complainant. (Exhibit 1). Respondent cited the following reasons for discipline:

Re: Camping Incident

- Failure to model behavior consistent with what CMHIP expects of its patients, that male and female patients are not to sleep together.
  - Complicated by fact that Complainant and Marsico were married to other individuals.
  - Newspapers articles emphasizing the improper action.
- Actions were non-therapeutic and negatively impacted patient progress.
- Actions demonstrated a failure to provide adult supervision during evenings.
- Failure to appropriately address the needs of a frightened child on the 2nd evening.
- Failure to meet expectations associated with being principal of Sierra Vista.
- Creating a hostile/offensive working environment.

Re: Traffic accident(s)

- Failure to report traffic accident to police.
- Being charged with Hit and Run, DUI, failure to obey traffic signal, failure to render aid in traffic accident.
- Statements made to police re: consumption of alcohol and inconsistencies creating concerns about judgment.
- Revocation of driver's license.
- Failure to demonstrate highest standards of personal integrity, truthfulness and honesty, and to inspire confidence and trust in government.
- Failure to comply with Colorado State Employee Handbook re: creating an adverse effect on the confidence of the public.
- Failure to notify Dr. Trautt at time of meetings re: camping incidents.

(Exhibit 1).

50. Based upon the above listed reasons, Respondent imposed discipline, in the form of termination, upon Complainant effective January 29, 1999. Respondent stated that the above reasons constituted grievous misconduct, willful misconduct, failure to perform job, inability to perform job and moral turpitude. (Exhibit 1, Drewnicky).

51. CMHIP only required employees to report criminal histories beginning in August 1998. (Drewnicky). At that time, CMHIP was aware that some employees may have failed to report criminal histories.

52. Drewnicky never asked Phelps or Finto directly if they had felt sexually harassed but relied on the investigatory report.

53. State Personnel Board Rule R-6-9, 4 CCR 801 (1998) provides, in part:

> Reasons for discipline include:
>
> 1. failure to perform competently;
> 2. willful misconduct or violation of these or agency rules or law that affect the ability to perform job; . . .
> 4. willful failure to perform. . . ; and
> 5. final conviction of a felony or other offense of moral turpitude that adversely affects the ability to perform the job or has an adverse effect on the agency if employment is continued.

54. State Personnel Board Rules R-6-2, R-6-5, R-6-6 and R-6-8, provide respectively:

R-6-2. A certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper. The nature and severity of discipline depends upon the act committed. When appropriate, the appointing authority may proceed immediately to disciplinary action, up to and including immediate termination.

R-6-5. An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. Corrective and disciplinary actions can be issued concurrently.

R-6-6. The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.

R-6-8. Corrective action is intended to correct and improve performance or behavior and does not affect current base pay, status, or tenure. It shall be a written statement that includes the areas for improvement, the actions to take, a

reasonable amount of time, if appropriate, to make corrections; consequences for failure to correct; and, a statement advising the employee of the right to grieve and the right to attach a written explanation. It may also contain a statement that the corrective action will be removed from the official personnel records after a specified period of satisfactory compliance. A removed corrective action cannot be considered for any subsequent personnel action.

DISCUSSION

I. INTRODUCTION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994*). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 and generally includes: (1) failure to comply with standards of efficient service or competence; (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment; (3) willful failure or inability to perform duties assigned; and (4) final conviction of a felony or any other offense involving moral turpitude.

In this disciplinary action of a certified state employee, the burden of proof is on the terminating authority, not the employee, to show by a preponderance of the evidence that the acts or omissions upon which discipline was based occurred and just cause existed so as to impose discipline. *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

> Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;

2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

II. Parties' Arguments

A. Respondent's Argument

In its closing argument, Respondent adopts all of the arguments it had made in response to Complainant's oral Motion for Directed Verdict. Additionally, Respondent argues that Complainant was disciplined, in the form of termination for at least three reasons. First of all, Respondent maintains that Complainant's actions on the May camping trip, and while driving an automobile, undermined the public trust. Respondent maintains that with regard to the driving while his ability was impaired, a specific nexus to Complainant's conduct is not necessary to determine whether or not Complainant should be disciplined. Respondent further argues that Complainant's actions during the camping trip cannot be tolerated for the principal of a regional treatment center such as Sierra Vista. Respondent relies upon Complainant's own testimony, the testimony of the appointing authority, and the testimony of an expert, to demonstrate the serious and flagrant nature of Complainant's activities. Respondent further maintains that Complainant's actions have adversely impacted CMHIP as demonstrated by the negative publicity in local and state newspapers. Respondent relies on the argument that Complainant's actions demonstrate a lack of accountability and that the only effective discipline was termination.

Respondent requests that the actions of the appointing authority be affirmed and that attorney fees be awarded.

B. Complainant's Argument

Complainant also incorporates the arguments made in his Motion for Directed Verdict. In addition, Complainant states that Respondent has failed to meet its burden of proof that the appointing authority did not act arbitrarily, capriciously, or contrary to rule or law. With regard to the camping trip, Complainant argues that the issues raised by Respondent regarding the frightened child and the supervision of youth on the camping trip are "red herrings" and should not be valued with regard to imposing

discipline. Complainant argues that of key importance is the fact that the investigation conducted by CMHIP concluded that Complainant's job performance was not impacted by the sleeping arrangements or the consequences thereof. Complainant further notes that testimony suggests that no sexual harassment or hostile work environment was created.

With regard to the traffic incidents, it is argued that Respondent inappropriately relied upon the conviction of a non-felony in determining the level of discipline. Complainant maintains that the traffic incidents did not involve matters of moral turpitude as defined by law. This argument is reinforced by noting that this administrative proceeding is not meant to replace the criminal justice system and that the criminal justice system has determined that no felonies, nor crimes of moral turpitude, were committed by Complainant.

Complainant further maintains that the only reason termination occurred was a result of the negative publicity of the state newspaper articles. Finally, Complainant argues that Respondent's actions are the result of the appointing authority acting arbitrarily and capriciously. Complainant requests that he be reinstated, with full back pay and no loss of privileges or seniority. Complainant also argues that he should be awarded attorney fees pursuant to C.R.S. 24-50-125.5 (1998).

III.

A. Traffic Accidents and DUI

There is limited case law in Colorado addressing the off-duty conduct of governmental employees and discipline imposed based upon such conduct. Two cases provide some measure of guidance. In *City of Colorado Springs v. Givan*, 897 P.2d 753 (Colo. 1995), a Colorado Springs city employee was convicted of a *felony* involving incest. Subsequently, the employee was terminated from his employment after an administrative hearing. In reviewing the matter on appeal, the Colorado Supreme Court considered a number of different issues. First, it noted that this matter involved a felony. Second, it noted the need for due process in the termination of the employee. The Court also considered whether sufficient findings were made by the administrative tribunal. In so doing, the Court noted that it was appropriate to consider the employee's off-duty conduct in determining if such conduct impacted his ability to perform his job. It was held that given the evidence in the case, and the testimony of various co-workers and supervisors, the off-duty conduct adversely impacted co-workers' relationships with the employee. The Court determined that the City appropriately considered this evidence in determining if the employee could still perform his job and in deciding to terminate the employee. A second case, *Harris v. City of Colorado Springs*, 867 P.2d 217 (Colo.App. 1993), involved a police officer being disciplined for off-duty conduct. In this case, it was held by the appellate court that the off-duty conduct of the police officer

directly reflected his fitness to be a police officer. In other words and in both cases, a nexus was determined to exist between the off-duty conduct of the employee and his job responsibilities/duties.

In this case, Complainant admitted to having first hit Nava's car, leaving the scene of the accident, and then hitting a parked car owned by an acquaintance. Complainant subsequently plead guilty to driving under the influence of alcohol. In so doing, Complainant effectively agreed that he exercised poor judgment in making the decision to "drink and drive." During his testimony before the Board, Complainant stated he had not consumed more than two beers and a margarita before leaving a bar and driving home. Nevertheless, the fact is that Complainant entered a plea of DUI, admitting to having a BAC of at least .17 and it would be remiss for the Board not to consider this plea in the course of its fact finding. As cited above, recent case law supports this level of fact finding.

Two issues must be noted which distinguish this matter from the facts of *Givan* and *Harris*. First, it is clear that Complainant was not convicted, nor did he enter a plea, to a felony or crime of moral turpitude. While the appointing authority argued that a "crime of moral turpitude" was involved with the events of June 3, 1999, case law does not support such an argument. Respondent's and Complainant's legal memorandum on moral turpitude acknowledge that driving under the influence of alcohol is not generally, or automatically, considered a crime of moral turpitude. As a result, and given the evidence presented, it cannot be persuasively argued that Complainant's actions involved crimes of moral turpitude such that they adversely impacted CMHIP and provided grounds for termination.

Second, the record does not support the conclusion that Complainant's conviction impacted his job performance. Respondent provided limited evidence on this issue. Respondent solicited testimony from the appointing authority and from an expert witness that somehow Complainant's traffic accidents could impact his job performance because he would no longer be an appropriate role model. Yet, no evidence was provided demonstrating that youth at CMHIP were aware of Complainant's traffic accidents or of the DUI plea. Nor was any evidence offered which would support that Complainant's co-workers and their relationships with Complainant were so affected as to threaten Complainant's work performance or abilities.

As a result, it cannot be concluded that the traffic accidents, the charges associated with the accidents, or the DUI plea support Respondent's position that Complainant was unable to perform his job competently, engaged in willful misconduct, failed to perform his job, or was convicted of a crime of moral turpitude. While not condoning Complainant's behavior, it must be noted Respondent failed to meet its burden of proof with regard to this issue. This conclusion is reinforced by exhibits 1, C, and D outlining Respondent's reasons for administering a suspension with pay,

convening a pre-disciplinary meeting, and imposing discipline. At no point does Respondent demonstrate that a sufficient nexus exists between the off-duty conduct of Complainant and his job. Respondent does outline vague grounds in an attempt to link the off-duty conduct and Complainant's job responsibilities. But such a nexus proves ethereal when placed in the context of the appointing authority's remarks. The language in these exhibits shows CMHIP's vehemence against Complainant's actions but merely alludes to his judgment being impaired and moral turpitude as defined by some non-legal standard. For instance, Respondent would argue that Complainant's actions show poor personal integrity and erode public confidence in government. With these vague expectations, Respondent has the burden to explain how Complainant allegedly violated such standards. It failed to do so. In addition, one cannot help but notice that the traffic accidents, and subsequent conviction of DUI, did not occur for behavior "on the job" or involve state property.

B. The Camping Trip

While the events related to the traffic accidents and the DUI fail to provide sufficient grounds for termination under Board R-6-9, the same cannot be said for the events of May 26 through May 28, 1998. Respondent did meet its burden of proof, by a preponderance of evidence, that Complainant failed to perform competently and engaged in willful misconduct . Complainant admits that he exercised poor judgment. He admits he shared a tent with a female co-worker for 2 nights during the camping trip. He also admits that modeling is a critical element in providing treatment to youth at Sierra Vista. Complainant was aware since his early career of the need to provide role modeling for troubled youth. Moreover, Respondent presented credible testimony from the Complainant, Drewnicky, and Adamek with regard to the importance of modeling in the treatment of youth. Testimony was also credible with regard to Phelps and Finto having to share a tent as a result of Complainant and Marsico sharing a tent. The mere fact that Phelps and Finto could have decided to sleep outside of the tent, and thus separately, is not persuasive. Complainant's actions, being the senior staff member on the trip, placed Phelps and Finto in an uncomfortable posture, at best. To adopt Complainant's position would be to advocate that it was acceptable to create a situation forcing Phelps and Finto to sleep outside of a tent for two evenings.

Complainant's response to the frightened youth on the 2nd evening of the camping trip reinforces Respondent's concerns about Complainant's ability to perform his job. In this instance, Complainant, by his own admission, failed to fully inquire as to the cause of the youth's fright. The resolution of having the youth sleep outside Complainant's tent, while Complainant was sleeping with a female staff member, is unacceptable given the nature of all of the youth's backgrounds. Moreover, what is also disconcerting is that given that these youth have been exposed to physical and sexual abuse, and have problems recognizing social boundaries, one must question whether it was appropriate to leave a frightened child outside of a tent unsupervised, allowing him

to be vulnerable to other youth.

Finally, and perhaps most disconcerting, is the fact that the staff failed to provide any supervision of the youth in the evening. Testimony solicited by both Respondent and Complainant support the fact that the male youth were not supervised during the evenings of the trip. No staff stood watch or conducted "bed" checks during the night-time hours. Given Sierra Vista's charge to provide a safe learning and treatment environment, failure to supervise the children is a critical failure to perform. All of the adults were entrusted to provide a mechanism for supervising the youth for the *entire* trip. As testified to by Adamek and Drewnicky, various methodologies exist for supervising the youth during the evenings. Staff failed to do so. For the purposes of this case, Complainant was the senior staff member of the trip and failed to exercise leadership with regard to this issue. Combined with his choice to share a tent with Marsico, it is clear that Complainant's judgment in the performance of his job, was impaired. Complainant would argue that Marsico was in charge of the camping trip, that Complainant merely accompanied the other staff members, and that Complainant had no supervisory responsibility. This argument is simply not persuasive, especially when Complainant, at the time of the trip, was aware that he was a final candidate for the principal position at Sierra Vista.

There is one troubling issue associated with Respondent's actions regarding the camping trip and Complainant. Namely, the action of Complainant's supervisor, Dr. Trautt, and the "anecdotal" note. The record fully supports that Respondent was aware of the incidents of the camping trip well before December 1998 and Complainant's suspension. The record demonstrates that Dr. Trautt had chosen to prepare a note to the file in June 1998 about Complainant's behavior and did not choose to implement a corrective or disciplinary action. An "anecdotal" note can be defined as a note providing a short account of some interesting incident. *The American Heritage dictionary of the English Language, 1981.* No significant evidence was put on by either party as to the use of anecdotal notes in the state personnel system. Complainant argues that Trautt's actions constituted a corrective action, that Complainant should not be disciplined twice for the same act, and that there are no grounds for termination based on the camping trip events. Rule R-6-5 states that an employee can only be corrected or disciplined once for a single incident. Rule R-6-8 defines a corrective action.

A comparison of the elements of a corrective action and the contents of the anecdotal note are as follows:

Elements of Corrective Action	**Anecdotal Note Elements**
1. Does not impact base pay, status or tenure.	1. Note does not impact base pay, status or tenure.

2. Written statement that includes areas for improvement.	2. Note is written statement and states Complainant is expected to display better judgement in future and not co-habitate with a co-worker in front of Sierra Vista youth.
3. Includes actions to be taken.	3. No actions are specified to be taken.
4. Provides for reasonable amount of time to take actions and improve.	4. No specific period of time is provided for improvement.
5. States consequences of failing to make corrections	5. No consequences are provided.
6. Statement of right to grieve.	6. No right to grievance statement was included.

In reviewing the two types of actions, it cannot be deemed that Complainant received a *de facto* corrective action. The note merely alerts Complainant that his actions with regard to modeling and use of judgment are being noted in the file and CMHIP would be monitoring his future actions in such regard. It must be noted that the anecdotal note did not address the issue of supervision of youth during the camping trip. Rather, it only addressed the issue of Complainant sharing a tent with a female co-worker. No evidence was presented at the time of the anecdotal note that would support that Complainant's supervisor was aware of the lack of supervision of youth during the camping trip. Thus, it cannot be argued that the anecdotal note was the equivalent to a corrective action for the purpose of improving Complainant's performance of supervising youth. It cannot be argued that Complainant was disciplined twice for the same incident. This analysis is supported by the fact that once CMHIP discovered that a failure in supervision had occurred, during the appropriate investigative process in December 1998, it considered this issue and incorporated it as part of the disciplinary action. Complainant admits during the R-6-10 meeting that no supervision occurred at night on the trip.

C. Progressive Discipline

In this instance, Respondent did not use progressive discipline. The appointing authority determined that Complainant's conduct involving the camping trip, the traffic accidents, and the DUI were so serious and flagrant, that no other disciplinary action was reasonable. Board Rule R-6-2 allows for such a level of discipline if the act(s) are serious or flagrant.

Given the above analysis, the traffic accidents and the DUI cannot be considered as to the level of discipline to impose. However, in the context of the evidence presented, the appointing authority appropriately considered Complainant's act of sharing a tent for 2 nights with a co-worker and failing to model behavior, the failure to adequately address the matter involving the frightened child, and the failure to provide for night time supervision of the youth on the camping trip. It is noteworthy that Complainant had extensive training and education with regard to caring for and providing education for youth in a regional treatment center environment. However, it is exactly this background which creates accountability for Complainant. Over many years, Complainant participated in educating youth who have been subject to physical and sexual abuse. He was aware of the various troubled backgrounds of the youth at Sierra Vista. The facts support the proposition that Complainant was well educated and trained. Yet, Complainant ignored his training on the camping trip.

In determining what level of discipline to impose in this matter, it would be remiss not to hold Complainant accountable for his actions. The appointing authority considered the nature, extent and seriousness of the Complainant's acts. The appointing authority testified that demotion was not an option in disciplining Complainant. It does not appear that a demotion or additional training would sufficiently "correct" Complainant's behavior given that he had already had a vast array of experience and training. In other words, Complainant had already had sufficient training, education, and experience to "know better" than to engage in his behavior during the camping trip. The appointing authority testified that demotion was not an option for discipline because Complainant would still have a level of authority and supervision over the youth (the same youth, or type of youth) before which he committed the acts which warranted discipline.

Given the serious and flagrant acts which occurred, the appointing authority imposed discipline within the range of reasonable alternatives.

D. Credibility

A comment must be made about the credibility of the witnesses. First of all, it is clear that Complainant's testimony in describing the events involved with the traffic accidents, the DUI, and the camping trip is less than credible. It is clear that Complainant is strongly motivated, given that he was disciplined, to portray the events in the most innocent light possible. He characterized himself as not having consumed much alcohol prior to driving, blamed the other car for not stopping after the first accident, and stated that he consumed vast quantities of alcohol after both traffic accidents thereby accounting for his BAC. Complainant further portrays his co-habitation of a tent as less than noteworthy and believes that there was no need to supervise the youth in the evening while camping even though it is done while at CMHIP. The facts do not support such an innocent interpretation of the events.

Moreover, it is clear from reviewing the evidence in the record that Complainant has contradicted himself numerous times in relating the events of the traffic accidents. Inconsistencies exist in his description of how much he drank, when he drank, and how he hit the automobile.

It should also be noted that Drewnicky's testimony demonstrates a strong bias against *some* of Complainant's actions not relevant to his performance. The evidence is filled with comments about Complainant being married to another woman while co-habitating a tent. It is also filled with comments about Complainant and Marsico having a personal relationship outside the context of the camping trip. She claims that such a relationship is "bothersome." Moreover, Drewnicky's own testimony that she applied a non-legal definition of moral turpitude suggests her bias against Complainant. Finally, it cannot be ignored that Drewnicky was under pressure to take action as a result of the newspaper articles . Nevertheless, the findings of fact support that Complainant was subject to discipline despite Drewnicky's bias.

E. Attorney Fees

Board Rule R-8-38, 4 CCR 801 (1998) and C.R.S. 24-50-125.5 provide for the award of attorney fees in which it is determined that a personnel action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. In this matter, little or no evidence was offered on this issue. However, it is clear that some rationale argument based on the evidence can be made to support the personnel action. In addition, no evidence was proffered as to whether the action was instituted in bad faith, maliciously, or as a means of harassment. Competent evidence was produced in the course of this matter by both parties, thereby preventing an award of fees based on the action being groundless.

CONCLUSIONS OF LAW

1. Complainant engaged in the following actions for which discipline was imposed: (1) failure to perform his job competently and willful misconduct by failing to model behavior on the camping trip; and, (2) failure to perform his job competently by failing to supervise or arrange for supervision during the nocturnal hours of the camping trip.

2. The disciplinary termination was within the range of reasonable alternatives available to the appointing authority.

3. The actions of the appointing authority were not arbitrary, capricious or contrary to rule and/or law.

4. Attorney fees should not be awarded to either party pursuant to section 24-50-125.5, C.R.S. (1998).

ORDER

Respondent's disciplinary action is to be UPHELD.

Dated this 22nd day
of June, 1999
at Denver, Colorado

G. Charles Robertson
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on this _____day of June, 1999, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Jill S. Matoon, Esq.
650 Thatcher Building
Pueblo, CO 81003

and in the interagency mail, addressed as follows:

Beverly Fulton
Stacy Worthington
Assistants Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203

_____